Children and Family Law Program
Committee for Public Counsel Services

Recent Developments
(July 2003 – December 2003)

Remember, always Shepardize! Applications for further appellate review may have been granted after the publication date of these case summaries. Furthermore, opinions may be "amended," sua sponte, or upon motion of a party.

Cases

ADOPTION – DISPENSING WITH PARENTAL CONSENT, EFFECT OF DECREE

Adoption of Scott, 59 Mass. App. Ct. 274 (2003) -- Grasso, Dreben, Mills.

The Appeals Court held that a mother whose parental rights had been terminated lacked standing to challenge a change in the department's permanent plan for the child. After the Probate Court had entered decrees terminating the parents' rights, the mother filed an abuse of discretion motion claiming DSS failed to consider the child's great-aunt as a possible placement. The mother argued she should be permitted to advance the motion because prior to entry of the judgment, the preadoptive parents changed their mind about adopting the child and DSS did not inform her of this new development. The mother did not appear at the trial. She did not appeal the termination judgment and did not appeal the judge's denial of her motion to reopen the evidence.

The Appeals Court noted that under G.L. c.119, §26 and c.210, §3(b), a decree terminating parental rights terminates the parent's right to receive notice of or consent to any legal proceeding…." Id. at 277 n.6. "Even when the department's shift is as radical as a change from a plan of adoption to one of guardianship or other disposition, after a finding of unfitness the Legislature has provided that a person named in the G.L. c.210, §3, petition is not entitled to additional notification." Id. at 278 (citing Adoption of Willow, 433 Mass. 636, 646 (2001)).

The mother attempted to avoid this statutory bar by arguing on appeal that her motion was in effect a motion for relief from judgment based on newly discovered evidence. However, the Appeals Court concluded that "in the absence of extraordinary circumstances, not here present, the mother may not rely on posttrial changes in a proposed plan for the child to reopen the proceedings even if they precede the entry of the decree." Id. at 277 & n.8. [But see Adoption of Rhona, 57 Mass. App. Ct. 479, 486-487 (2003), in which the Court held that because of the lengthy delay between the conclusion of trial and entry of judgment, the trial judge should have reopened the evidence to allow the parties to submit updated information.] The Court concluded that the lower court properly denied her motion, "particularly here, where the mother did not participate in the trial." Id. at 279.

Finally, the Appeals Court noted that DSS must inform child's counsel "as soon as [any] placement with the preadoptive family unravel[s]." Id. at 278 (citing Adoption of Terrence, 57 Mass. App. Ct. 832, 841 (2003)). The court must also be kept informed of any changes in the plan. Id. at 279.

APPEALS – SUPERINTENDENCE OF INFERIOR COURTS UNDER CH. 211, § 3

Phillips v. Budzianowski, 440 Mass. 1008 (2003) (rescript).

See Indigent Court Costs Act.

APPELLATE PRACTICE – PRESERVATION OF APPELLATE ISSUE

Custody of Kali, 439 Mass. 834 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Sufficiency of Argument; Best Interests of Child – Stability of Caregiver; Judicial Findings – Reference to Statutory Factors.

In this private custody dispute between two parents, the father argued for the first time on appeal that the probate judge should have decided custody under a different section of the paternity statute. The SJC held that since the father did not raise the issue in the probate court, the argument was waived. Id. at 839. "[T]his court has, in exceptional cases, exercised its discretion to consider a claim not raised in the trial court where the opposing party would not be prejudiced … and [where] necessary … to prevent injustice or resolve an important question of law…." Id. (citations omitted). The facts of the case did not meet this standard. Id.

Commonwealth v. Murphy, 59 Mass. App. Ct. 571 (2003) – Gelinas, Doerfer, Green. See Evidence – Expert Testimony, Reliability.

On appeal of defendant's conviction for larceny and related offenses, the defendant argued that the trial judge erred in failing to strike the testimony of a handwriting expert about certain conclusions she reached regarding the authorship of the questioned signatures. At the time of the initial testimony, the defense did not object or submit a motion to strike. Instead, the defendant moved to strike the testimony the next day, only after a lengthy cross-examination. The Appeals Court held that the objections were untimely and thus the defendant did not preserve the issue for appeal. Id. at 574. "Objections must be taken to evidence when it is offered." Id. (quoting Commonwealth v. Silva, 343 Mass. 130, 135-136 (1961)).

APPELLATE PRACTICE – SUFFICIENCY OF THE ARGUMENT

Custody of Kali, 439 Mass. 834 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Preservation of Appellate Issue; Best Interests of Child – Stability of Caregiver; Judicial Findings – Reference to Statutory Factors.

In this private custody dispute between two parents, the father's constitutional claim did not cite to relevant authorities or parts of the record as required by Mass. R. App. P. 16(a)(4). Thus, it did not rise to the level of acceptable appellate argument and the SJC refused to consider the claim. Id. at 838.

APPELLATE PRACTICE – SUFFICIENCY OF THE RECORD

Covell v. Dept. of Soc. Servs., 439 Mass. 766 (2003) - Marshall, Greaney, Spina, Sosman, Cordy. See Fair Hearing – Substantial Evidence.

Covell appealed the decision of a hearing officer to list Covell in the registry of alleged perpetrators. The Superior Court affirmed and the Appeals Court reversed. 54 Mass. App. Ct. 805 (2002). On further appellate review, the SJC noted that Covell did not include a transcript of the fair hearing in the appellate record. This alone, required a ruling in favor of DSS. Id. at 782-783. "That a transcript must be submitted to support a claim that the evidence was insufficient is not some hypertechnical requirement, but a reflection of the fact that resolution of such a claim requires the reviewing court to see the entirely of the evidence that was presented." Id. at 782. Nevertheless, the SJC reviewed Covell's claims on the merits.

BEST INTERESTS OF CHILD – STABILITY OF CAREGIVER

Custody of Kali, 439 Mass. 834 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Preservation of Appellate Issue; Appellate Practice – Sufficiency Of Argument; Judicial Findings – Reference to Statutory Factors.

In this custody dispute between two parents, the SJC discussed the "best interests of the child" standard as it arose in Massachusetts. Although focused on private custody disputes between two fit parents, the case includes some language about the importance of continuity and stability of the parent-child relationship that might be helpful in state intervention cases. The SJC remarked that "… it is in the best interests of the child to preserve the current placement with a parent, if it is a satisfactory one, and that stability and continuity with the child's primary caregiver is itself an important factor in a child's successful upbringing." Id. at 842 (citations omitted). The SJC further commented that "if the parenting arrangement in which a child has lived is satisfactory and is reasonably capable of preservation, it is ordinarily in the child's best interests to maintain that arrangement, and contrary to the child's best interest to disrupt it. Stability is itself of enormous benefit to a child, and any unnecessary tampering with the status quo simply increases the risk of harm to the child." Id. at 843.

CHILD'S PREFERENCE – WEIGHT GIVEN IN DETERMINING CUSTODY

Adoption of Flora, 60 Mass. App. Ct. 334 (2004) — Greenberg, Dreben, McHugh.

See Counsel – Role of Child's Counsel.

COUNSEL – CONFLICT OF INTEREST

Commonwealth v. Croken, 59 Mass. App. Ct. 921 (2003) (rescript).

The Appeals Court held that the defendant was not denied effective assistance of counsel where his trial attorney had an undisclosed personal relationship with an assistant district attorney working in the same office prosecuting the defendant's case. Id. at 921-922. In an earlier decision, the SJC held that the defendant was entitled to an evidentiary hearing to show that he was prejudiced by the conflict. See Commonwealth v. Croken, 432 Mass. 266, 271-276 (2000). Following an evidentiary hearing in the Superior Court, the defendant again appealed. The Appeals Court held that the defense counsel's representation was free from any conflict of interest and even if it were found, it would not have been materially prejudicial to the defendant to warrant a new trial. 59 Mass. App. Ct. at 921-922.

During most of the duration of the case, the defense attorney had an undisclosed intimate relationship with a member of the district attorney's office, Jane Doe, who was also a colleague of the prosecutor assigned to the case. In reviewing the record, the Appeals Court found that the defense attorney had never made any disclosure, intentional or otherwise, directly or indirectly through Doe to the prosecutor or DSS. Consequently, the judge found that there was no actual conflict of interest and ruled that a new trial was unwarranted. The court noted that nothing in the record indicated that defense counsel's "'independent professional judgment' was impaired by his own personal interests arising from his relationship with Doe." Id. at 922 (quoting Commonwealth v. Shraiar, 397 Mass. 16, 20 (1986)). The court further found that defendant's trial attorney vigorously and zealously represented the interests of his client, and he maintained his professionalism throughout the case in terms of the legal product he put forth in preparing and presenting the defense. Id.

COUNSEL – INEFFECTIVE ASSISTANCE

Commonwealth v. Vickers, 60 Mass. App. Ct. 24 (2003) –Laurence, McHugh, Cohen. See Counsel – Right to Counsel.

Defense counsel's performance was ineffective because she deliberately declined to participate in the proceedings after the defendant voluntarily absented herself from the trial. Id. at 32-35. Although the defendant waived her right to be present, she did not waive her right to effective assistance of counsel. Id. at 32. The Court noted that "it is hard to imagine a situation calling for more assiduous representation than when a defendant is being tried in absentia." Id. On the first day of trial, the defendant was not present in the courtroom. The defense attorney, apparently mistaken about her obligations in such a situation, made no objections and responded "no comment" when asked if she wanted to cross-examine the Commonwealth's primary witness or object to the publication of an exhibit. She continued in this manner during the second day, objecting to the trial continuing without her client but otherwise not participating. She later changed her mind and began to participate, making objections and cross-examining witnesses. Id. at 33-34. The Appeals Court concluded that defense counsel "deprived the defendant of meaningful representation" for a good portion of the trial. Id. at 34. The Court further noted that "this case comes close to falling within that rare category where the defense was so botched that judgments on the hypothetical question whether better work might have accomplished something material would be without value." Id. at 35.

COUNSEL – RIGHT TO COUNSEL

Commonwealth v. Vickers, 60 Mass. App. Ct. 24 (2003) – Laurence, McHugh, Cohen. See Counsel – Ineffective Assistance.

The trial judge improperly conditioned the defendant's request for new counsel on an increase in bail. Id. at 30-31. The judge could have denied the defendant's request for new counsel made on the day of trial, but she did not

do that. Instead, she stated that new counsel could be appointed but that new bail would be set. The defendant then withdrew her request for new counsel. The judge's linkage between new counsel and bail violated her right to counsel. Id.

COUNSEL – ROLE OF CHILD'S COUNSEL

Adoption of Flora, 60 Mass. App. Ct. 334 (2004) — Greenberg, Dreben, McHugh. See Parental Unfitness – Sufficiency of the Evidence.

The mother and Flora appealed from a judgment terminating parental rights and from the judge's failure to order posttermination visitation. DSS planned to return Flora to her father. The Appeals Court vacated the judgment and remanded for further proceedings because Flora's trial counsel failed to advocate for her wishes to maintain contact with her mother in violation of CPCS's Performance Standards. Id. at 339-340 (citing Care and Protection of Georgette, 439 Mass. 28 (2003)). The Court noted that the standards require counsel to elicit the child's preferences and represent the child's expressed preferences if counsel reasonably believes the child is competent to make an adequately considered decision. Id. at 339.

The Appeals Court questioned counsel's failure to seek post-termination visitation when there was ample evidence that Flora was bonded to her mother coupled with her emotional deterioration after the visits with her mother ended. Id. at 341. Although there was evidence of the strong bond between Flora and her mother, the evidence was buried in voluminous reports. Id. at 340. Flora's trial attorney never advised the court of Flora's strong interest in maintaining contact with her mother, never referred to the evidence of their favorable relationship, and conducted an extremely hostile cross-examination of the mother at trial. Id. The Appeals Court had serious doubts as to whether the judge would have made the same rulings had trial counsel met his obligations to his client. Id. at 341.

The Court also remanded for further hearings on whether termination was in Flora's best interests. It noted that there was no evidence that the father's new wife desired to adopt Flora. Also since Flora was now 12, her consent was required before she could be adopted. Id. at 342. As such, the court instructed that "Flora's wishes as to termination, as well as visitation, should be considered on remand." The Court noted that even though the mother was unfit, "there are some situations in which the child's best interest may be served without a decree of termination." Id.

COUNSEL – RULES OF PROFESSIONAL CONDUCT, COMMUNICATION WITH FORMER EMPLOYEES

Clark v. Beverly Health and Rehabilitation Servs., 440 Mass. 270 (2003) -- Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy.

In this case, the SJC held that Mass. R. Prof. C. 4.2, which prohibits an attorney from communicating *ex parte* with certain employees of a represented party, does not apply to former employees.

In two recent cases, the SJC discussed the application of Rule 4.2 to organizations. Messing, Rudavsky & Welicky, P.C. v. President & Fellows of Harvard College, 436 Mass. 347 (2002); Patriarca v. Center for Living and Working, 438 Mass. 132 (2002). Following Messing, the SJC amended the Comment section of Rule 4.2. [The Messing case and the revised Rule 4.2 are discussed in detail in the winter 2003 CAFL newsletter.] Both cases left open the question of whether Rule 4.2 applies to former employees.

In Clark v. Beverly Health and Rehabilitation Servs., the SJC decided that Rule 4.2 does not apply to former employees of an organization. The SJC examined the revised Comment 4 of the Rule and noted that the Comment makes it clear that only certain *current* employees properly fall within the ambit of the Rule. Comment [4] coupled with the language in Messing illuminates the fact that only contact with *current* employees is governed by the rule. The court further stated that "the purposes of rule 4.2 would not be served by including

former employees within its reach." Id. at 275-76. The rule is intended to protect the attorney-client relationship, not to prevent the disclosure of unfavorable facts simply because they took place in the workplace. Id. at 276.

The SJC then went on to comment that while organizations may not immunize their former employees from contact with opposing counsel, attorneys must still be cognizant of other applicable rules of professional conduct, including rules governing truthfulness to third parties (Rule 4.1); dealings with unrepresented parties (Rule 4.3), and the prohibition on using unfair or illegal tactics to obtain evidence (Rule 4.4). Id. at 278-279. "[C]ounsel must also be careful to avoid violating applicable privileges or matters subject to appropriate confidences or protections." Id. at 279.

DEPARTMENT OF SOCIAL SERVICES – FAILURE TO DISCLOSE CHILD'S CHANGE OF PLACEMENT

Adoption of Scott, 59 Mass. App. Ct. 274 (2003) -- Grasso, Dreben, Mills.

See Adoption – Dispensing With Parental Consent, Effect of Decree.

EVIDENCE – EXPERT TESTIMONY, BEHAVIOR CHARACTERISTICS OF SEXUALLY ABUSED CHILDREN

Commonwealth v. Bougas, 59 Mass. App. Ct. 368 (2003) -- Cowin, Kass, Green.

The Appeals Court held that the trial judge properly excluded expert testimony offered by the defendant that children embroiled in serious family conflict often lie about sexual abuse because the testimony would have improperly branded the complainant as untrustworthy. Id. at 375-376. The defendant objected to what he perceived as an "unfair inconsistency between admission of the Commonwealth's expert testimony on the "delayed disclosure syndrome" common among child victims of sexual abuse and exclusion of his expert's proposed testimony that children "enmeshed in serious family turmoil often fabricate allegations of this nature." Id. at 375. The Court acknowledged that there is a fine line between permissible testimony about the typical symptoms of sexually abused children, and expert testimony which impermissibly interferes with the jury's responsibility to make ultimate decisions regarding a witness's credibility. Id.

Here, the Appeals Court found that the lower court acted within its discretion in drawing the appropriate line. "Expert testimony that abused children often delay reporting the abuse, a familiar and permitted proposition … informs the jury that the victim's failure to disclose in a timely fashion does not necessarily exonerate the defendant without suggesting that the particular child witness in the case was or was not abused." Id. at 376. However, expert testimony that children often fabricate sexual abuse stories when there is family controversy "essentially brands the class of which the alleged victim is a member as untrustworthy, and directly encourages the jury to disbelieve the specific child witness before them." Id. at 376. This type of testimony has been "explicitly condemned" by the SJC. Id. (citing Commonwealth v. Ianello, 401 Mass. 197, 201-202 (1987)).

Commonwealth v. Deloney, 59 Mass. App. Ct. 47 (2003) – Cypher, Kantrowitz, Cowin.

The Commonwealth's expert witness impermissibly vouched for the credibility of the complainant because the expert's testimony concerning the supposed general characteristics of abused children too closely mirrored the characteristics of the individual child in this case. Id. at 59. "The line between permissible and impermissible opinion testimony in child sexual abuse cases is not easily drawn." Id. at 55 (citation omitted). Testimony that explains to the jury that child abuse victims may behave differently than expected is permissible. Id. at 56. However, testimony that describes what a typical victim looks like and suggests that the complainant in the case matches those characteristics is not permissible. Id That is what happened here. The expert described 8 characteristics common to victims of child sexual abuse, each of which matched the complainant. Id. at 57-58. Although not expressly noted by the Appeals Court, some of the "child victim" characteristics sounded more like

defendant profiling than behavioral characteristics of victims, which is never permitted in criminal cases. Id. For example, the expert testified that victims are often told by the perpetrator to keep the abuse secret, that victims often receive gifts from the perpetrator, and that victims are especially vulnerable to trusted persons. Id. at 58.

EVIDENCE – EXPERT TESTIMONY, CREDIBILITY OF WITNESS

See Evidence – Expert Testimony, Behavior Characteristics Of Sexually Abused Children.

EVIDENCE - EXPERT TESTIMONY – HEARSAY

Commonwealth v. Boyer, 58 Mass. App. Ct. 662 (2003) -- Mason, Kantrowitz, Doerfer.

A hearsay statement contained in a report may be relied upon by an expert in formulating an opinion. However, unless some exception to the hearsay rule applies, the statement cannot be admitted substantively. Here the judge improperly relied on a hearsay statement contained in a probation report in determining that Boyer was a sexually dangerous person under G.L. c.123A. Id. at 666-668.

EVIDENCE – EXPERT TESTIMONY, RELIABILITY

Commonwealth v. Murphy, 59 Mass. App. Ct. 571 (2003) – Gelinas, Doerfer, Green. See Appellate Practice – Preservation of Appellate Issue.

On appeal of convictions for larceny and related offenses, the defendant argued that the testimony of a handwriting expert should not have been admitted because of weaknesses in its scientific reliability. However, the defendant did not object until after the witness had testified. The defendant should have filed a motion requesting a Lanigan hearing prior to the introduction of the evidence. Id. at 575. Moreover, the court noted that since testimony by handwriting experts has long been recognized and accepted in Massachusetts courts as being reliable and scientific, a hearing would not have been necessary even if the defendant had requested one. Id. at 576 (citing Commonwealth v. Frangipane, 433 Mass. 527, 538 (2001)).

The Court then noted that the opinion of a handwriting expert is a "variety of a 'soft science' that is highly dependent on information derived from such sources as personal observations, clinical assessments, and statistical data, and as such we defer especially to the judge's exercise of discretion." Id. at 576 (citing Canavan's Case, 432 Mass. 304, 318 (2000)).

EVIDENCE – HEARSAY, LEARNED TREATISE

Commonwealth v. Johnson, 59 Mass. App. Ct. 164 (2003) – Grasso, McHugh, Mills. See Evidence – Hearsay, Medical & Hospital Records.

At the defendant's trial for operating under the influence, the trial judge erred in admitting in evidence, The Pill Book, a book about medication purchased from a CVS pharmacy. Id. at 171. The prosecutor sought to admit portions that described the effects of certain prescription medications. The book satisfied no exception to the hearsay rule. It did not fall under the learned treatise exception under G.L. c.233, §79C, which permits the admission of treatises or periodicals in medical malpractice and contract cases. Id. at 170. It also was not admissible under the learned treatise exception of Proposed Mass. R. Evidence, adopted in Commonwealth v. Sneed, 413 Mass. 387, 395-396 (1992). Id. That exception only permits reading statements from a treatise on cross-examination of an expert witness. Id. at 170-171. Nor was the book an appropriate subject for judicial notice. Id. at 170.

EVIDENCE – HEARSAY, MEDICAL & HOSPITAL RECORDS

Commonwealth v. Johnson, 59 Mass. App. Ct. 164 (2003) – Grasso, McHugh, Mills. See Evidence – Hearsay, Learned Treatise.

The trial judge erred in admitting portions of the defendant's hospital record that contained a facially unreliable rapid urine screen test. Id. at 169. The defendant was convicted of operating under the influence of cocaine. The test report stated right on it that a second test was required "to obtain a confirmed analytical result." No testimony was offered to explain the test results or the meaning of the disclaimer. As such it was not admissible under G.L. c.233, §79, because it was not sufficiently reliable. Id.

Commonwealth v. Aviles, 58 Mass. App. Ct. 459 (2003) – Cypher, Kantrowitz, Cowin.

Portions of the complainant's hospital records were properly admitted at trial of the defendant for rape of a child under 16 even though the records contained statements concerning the alleged abuse. Id. at 464-465. The defendant argued that those portions were inadmissible under G.L. c. 233, §79 because they concerned liability. However, the Appeal Court held the statements admissible because they were easily understood as allegations of the complainant, not statements of fact, and because the statements were the kind of information relied upon by hospital staff in making a diagnosis. Id. at 464.

EVIDENCE – HEARSAY, PRIOR RECORDED TESTIMONY

Commonwealth v. Roberio, 440 Mass. 245 (2003) – Marshall, Greaney, Ireland, Spina, Cowin.

The SJC held that the prior recorded testimony of two witnesses was properly admitted at the defendant's second trial for murder and armed robbery. The defendant's convictions from the first trial were reversed because of ineffective assistance of counsel. At the second trial, the prosecution introduced the prior recorded testimony of two witnesses from the first trial. The defendant argued that admission of the testimony was improper because neither witness was "unavailable." In addition, the defendant argued he did not have an adequate opportunity to cross-examine one of the witnesses at the first trial because his counsel was ineffective. The SJC rejected both arguments.

Neither witness was available at the time of trial, but both would have been available sometime after the trial was expected to conclude. One witness had emergency surgery and would have been able to testify a week later. The second witness initially could not be located, but in the middle of trial was arrested in another state. It would have taken some time for the prosecution to arrange for him to be brought to Massachusetts. The defendant argued that neither witness was unavailable, it was merely inconvenient for the prosecution to bring them in to testify. However, the SJC disagreed holding that both witnesses were unavailable. Id. at 248-250.

In addition, the Court rejected the defendant's argument that the testimony of the second witness should have been excluded because trial counsel's cross-examination of the witness was ineffective. Id. at 250-254. The issue before the Court was "whether, when there has been a determination that counsel was ineffective in an earlier trial, the defendant had adequate opportunity to cross-examine the witness on that occasion, so that admission of the witness's recorded testimony at the second trial is not fundamentally unfair." Id. at 250. Defense counsel may be ineffective in some respects and effective in others. Id. 251, 252. The Court noted that a perfect cross-examination is not required, merely an adequate one or a reasonable strategic decision to forego questioning. Id. at 252.

In this case the Court held that cross-examination of the witness was adequate. Trial counsel was found ineffective for failing to present evidence of the defendant's mental condition and intoxication. However, the witness's testimony was limited in scope and had no bearing on that issue. Id. at 252. The defendant argued that he should have had an opportunity to question the witness on that subject, theorizing that the testimony would be helpful to him. However, the Court refused "… to adopt a per se rule that, if failure to present a certain defense is the basis for reversal of a conviction, cross-examination of each witness must have focused on that subject or that witness's prior recorded testimony is not admissible. This is particularly true concerning a witness whose testimony is as restricted in scope [as the witness's testimony in this case]." Id. at 253-54.

EVIDENCE – JUDICIAL NOTICE

Commonwealth v. Johnson, 59 Mass. App. Ct. 164 (2003) – Grasso, McHugh, Mills. See Evidence – Hearsay, Medical & Hospital Records.

See Evidence - Hearsay, Learned Treatise.

EVIDENCE – WITNESS CREDIBILITY, RELIGIOUS BELIEFS

Commonwealth v. Kartell, 58 Mass. App. Ct. 428 (2003) Gelinas, Cowin, McHugh.

The trial judge did not error when he permitted the prosecutor to cross-examine the defendant regarding his religious beliefs and practices (or lack thereof). The questioning was relevant to explain that certain statements made by the defendant about the victim were motivated by jealousy. Id. at 436-437. Evidence about a witness's religious beliefs may not be admitted to enhance or discredit the witness's credibility. Id. at 436. However, that does not mean that any evidence touching on religious beliefs is barred. Id. at 437. Here, the prosecutor's questions were both relevant and secular in purpose. Id.

FAIR HEARING – SUBSTANTIAL EVIDENCE

Covell v. Dept. of Soc. Servs., 439 Mass. 766 (2003) - Marshall, Greaney, Spina, Sosman, Cordy. See Appellate Practice – Sufficiency of the Record.

In Covell, the SJC considered the standard of review to be applied when determining whether an individual's name should be listed on the DSS registry of alleged perpetrators. There was no issue concerning the identity of the alleged perpetrator. Covell's stepdaughter had alleged that he sexually abused her. Rather, the factual dispute centered on whether the abuse itself occurred. The SJC held that applying either the "reasonable cause to believe standard" or the "substantial evidence test," the evidence was sufficient to support the allegation of abuse. Thus, the SJC reversed the decision of the Appeals Court, 54 Mass. App. Ct. 805 (2002), and affirmed the department's decision to list Covell in the registry. 439 Mass. at 767.

The SJC began by reviewing the applicable DSS regulations. To support an allegation of child abuse or neglect, DSS need only find reasonable cause to believe that abuse or neglect by a caretaker did occur. Id. at 775 (citing 110 CMR §4.32). The perpetrator may or may not be identified. An identified perpetrator should be listed in the registry if three conditions are met: (1) the incident of abuse or neglect has been supported; (2) referral has been made to the district attorney's office; and (3) "there is substantial evidence indicating that the alleged perpetrator was responsible for the abuse or neglect." Id. at 776, 779-780 (citing 110 CMR §4.37). The regulations define "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 776 (citing 110 CMR §4.37); see also G.L. c. 30A § 1(6).

Covell's argument assumed (and indeed DSS and the Appeals Court appeared to assume) that DSS must present substantial evidence that the underlying abuse occurred in order to list him in the registry of alleged perpetrators. Id. at 779, 781 & n.15. However, the SJC stated that "a careful reading of the regulations … does not suggest such a requirement." Id. at 779. Rather, the SJC noted that "once the department has properly decided to support the report of abuse based on the 'reasonable cause' standard, the listing of the alleged perpetrator is merely a matter of identification. It does not reopen, or impose a higher standard of proof on, the underlying determination that the abuse occurred." Id. at 781. The Court concluded that "if that is the correct interpretation of the regulations, there is no error in the listing of Covell." Id.

Nevertheless, the SJC acknowledged that DSS in this case, and in other cases, seems to have assumed that the "substantial evidence" standard applies to the finding of abuse itself if it wants to list someone on the registry of alleged perpetrators. Id. at 781 & n.15. Thus, the SJC went on to review the evidence under the higher "substantial evidence" standard, "assuming (without deciding) that the regulations require" application of the

higher standard. Id. at 781-782. The SJC concluded that even under the substantial evidence test, there was sufficient evidence of the underlying alleged abuse. Id. at 783.

In reaching its decision, the SJC noted that the stepdaughter's allegations were specific, detailed and consistent, that she was 13 and not a small child, that her description of the circumstances was realistic, and that she appeared to have no motivation to lie. Id. at 783-785. Although the girl's statements came only from hearsay sources, the SJC held that that "[s]ubstantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability.'" Id. at 786.

The SJC also firmly rejected the Appeals Court definition of substantial evidence finding that "[t]he substantial evidence test does not become more stringent or more relaxed based on a judge's perception that a particular agency decision is of greater or lesser importance or portends consequences of greater or lesser severity." Id. at 783. This statement was in response to the language in the decision of the Appeals Court which read that the "level of the evidence necessary to satisfy the test varies depending on the 'significance of the finding to be made.'" Id.

Finally, in a footnote, the SJC remarked that DSS regulations describe two permissible situations for listing an alleged perpetrator where the evidence equally supports either of two possible perpetrators (i.e., mother or father, father or grandfather). Id. at 776 n.10 (citing 110 CMR §4.33). The SJC stated that these examples did not satisfy the substantial evidence test. Id.

Lindsay v. Dept. of Soc. Servs., 439 Mass. 789 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy.

In Lindsay, the SJC appears to have resolved the question raised in Covell: what is the quantum of evidence required to list someone on the DSS registry of alleged perpetrators? The Court held that there must be "substantial evidence" supporting the hearing officer's conclusion that there is "reasonable cause to believe" that the abuse or neglect occurred. Id. at 798.

Plaintiff, the owner and director of a day care center, sought judicial review of a decision to support an allegation of child neglect at the center. Lindsay argued that the standard to be applied when determining whether an allegation of abuse or neglect should be supported is one of substantial evidence and not reasonable cause to believe the abuse occurred. Lindsay also claimed that the department had no jurisdictional authority to investigate the allegations of child neglect in this case because there was no obvious injury to the child in question. The plaintiff also challenged the sufficiency of the evidence to support a finding of child neglect. The SJC rejected the claims of the plaintiff and upheld the decision of the trial court. Id at 790. Moreover, the court found that the department's jurisdictional arm reaches cases of child neglect even when there is no apparent physical or emotional injury to the child. Id. at 793-797. The court further held that there was substantial evidence to support the hearing officer's finding of a reasonable cause to believe neglect occurred. Id. at 798.

Lindsay contended that, for want of jurisdictional authority, the department may not investigate a case such as the one before the court because the alleged neglect did not produce any physical or emotional injury to the child. However, the court found this argument unpersuasive. The SJC held that the intent of the statute is to protect children from neglect and abuse and that, if there is reason to believe that either is occurring, the department is well within its powers to investigate and make a finding on the matter. Id. at 795. "The purpose of this statutory scheme is to alert the department to instances where children may have been abused or neglected and, if the department's investigation confirms those suspicions, to take steps to protect the child and correct the underlying situation that led to the abuse or neglect…. If children are to be protected from 'neglect,' it makes no sense for the department to wait until neglect has already run its course to the point of producing a physical or emotional injury." Id. Thus, the department is empowered to act even where no injury has occurred. Id. at 797.

Lindsay also advanced the argument that the department's decision was not supported by substantial evidence. The court outlined the steps that are taken when a report of child abuse or neglect is filed. To support a claim of abuse or neglect, only a reasonable cause to believe the abuse or neglect occurred need be shown. Id. at 797-798.

However, the court noted that when it looks to "see whether there was 'substantial evidence' to support the hearing officer's decision, G.L. c. 30A, § 14(7)(e), there need only be 'substantial evidence' supporting the conclusion that there was 'reasonable cause to believe' that Lindsay neglected [the child]." Id. at 798. In applying this threshold test, the court found the record to contain ample and substantial evidence supporting the investigator's conclusion that there was reasonable cause to believe that neglect had occurred. Id. at 798-800.

Finally, the SJC rejected Lindsay's argument that the "reasonable cause standard" violated due process. Id. at 800-804.

INDIGENT COURT COSTS ACT

Phillips v. Budzianowski, 440 Mass. 1008 (2003) (rescript).

Pursuant to G.L. c.261, §27D, the decision of a single justice of the Appeals Court on a denial of a motion for funds under the Indigent Court Costs Act is final. Phillips filed a motion for funds in the Probate Court, which was allowed in part and denied in part. Pursuant to c.261, §27D, Phillips then appealed to a single justice of the Appeals Court, who dismissed the appeal as untimely and lacking in merit. Phillips then filed a G.L. c.211, §3 petition with a single justice of the SJC, which was denied. The SJC affirmed. Id. G.L. c.261, §27D states that the decision by the court deciding the appeal "shall be final." The SJC noted that "[r]arely should we employ our superintendence power to review rulings in matters in which the Legislature has expressly stated that the decision of another court or judge shall be final." Id. (citing Hurley v. Sup. Ct. Dep't of the Trial Court, 424 Mass. 1008, 1009 (1997)).

JUDICIAL FINDINGS – REFERENCE TO STATUTORY FACTORS

Custody of Kali, 439 Mass. 834 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Preservation of Appellate Issue; Appellate Practice – Sufficiency of Appellate Argument; Best Interests of Child – Stability of Caregiver.

In this private custody dispute under the paternity statute, the SJC held that the judge should have referenced the statutory factors in his findings, but that failure to do so was not fatal where the judge's findings demonstrated that he adequately considered the factors in making his final custody determination. Id. at 845. The father argued that the judge did not consider the factors enumerated in the statute nor did he specifically reference the findings in his determinations. The SJC acknowledged that the judge did not specifically reference the factors but refuted the father's contention that the factors were not adequately considered. In reaching this conclusion, the SJC stated that "[o]rdinarily, a judge should both reference the statutory requirements and explain their impact, if any, on the custody award." Id. However, while this is normally the case, the Court here refused to look strictly at the form over the substance of the judge's findings. The findings themselves indicated that the judge considered each of the three factors. Id. at 845-846.

PARENTAL UNFITNESS – SUFFICIENCY OF THE EVIDENCE

Adoption of Flora, 60 Mass. App. Ct. 334 (2004) -- Greenberg, Dreben, McHugh. See Counsel – Role of Child's Counsel.

The mother appealed from decrees terminating her parental rights to two children, Flora and Neil. Flora also appealed the judgment terminating her mother's rights. The Appeals Court found that there was clear and convincing evidence that the mother was an unfit parent. She had a long history of substance abuse and her participation in treatment was inconsistent and unsuccessful. Id. at 336–338. The Court affirmed the termination decree with respect to Neil who had spent most of his life in foster care, had special needs, and was not bonded to his biological mother. Id. at 338. However, the court remanded the judgment with respect to Flora to determine whether termination was in her best interests. Id. at 339–342. Flora was bonded to her mother, wished to have continued contact with her, and was to be placed with her biological father. Id.